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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL CONTRERAS,

Defendant and Appellant.

B250625

(Los Angeles County
Super. Ct. No. MA059379)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Murphy, Judge. Modified and, as so modified, affirmed.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Miguel Angel Contreras appeals from the judgment entered following a jury trial that resulted in his conviction for assault with a deadly weapon. Pursuant to the Three Strikes law, Contreras was sentenced to a term of six years in prison. He contends: (1) use of his prior juvenile adjudication as a “strike” violated his right to trial by jury; and (2) he is entitled to additional custody credits. The latter contention has merit, and we order the judgment modified. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 19, 2013, Optali Diaz Lopez, a maintenance technician at a Palmdale apartment complex, saw Contreras at the complex. Because Contreras, who was not a tenant, had been observed picking cigarettes up off the ground and exposing himself to children, Lopez asked Contreras to leave. Contreras complied, but returned that evening at approximately 10:00 p.m. Lopez again asked Contreras to leave, but Contreras refused. When the men verbally argued, Contreras struck Lopez above the eye with a 32-ounce glass beer bottle, cutting him.

A jury convicted Contreras of assault with a deadly weapon¹ (Pen. Code, § 245, subd. (a)(1)).² Contreras waived his right to a jury trial on the allegation that he had a sustained juvenile petition for robbery in 1996, a serious or violent felony (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). After a bench trial, the court found the prior conviction allegation true. It sentenced Contreras to the midterm of three years, doubled to six years pursuant to the Three Strikes law. It imposed a restitution fine, a suspended parole restitution fine, a court security fee, and a criminal conviction assessment. Contreras appeals.

¹ The jury was unable to reach a verdict on a second charge of assault by means likely to produce great bodily injury, and the trial court declared a mistrial on that count.

² All further undesignated statutory references are to the Penal Code.

DISCUSSION

1. *Use of the juvenile adjudication as a “strike” did not violate Contreras’s right to jury trial.*

As noted, the trial court used Contreras’s prior juvenile adjudication to double his sentence under the Three Strikes law. Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466, Contreras contends that this use of his prior juvenile adjudication as a “strike” violated his constitutional right to trial by jury. Contreras acknowledges that *People v. Nguyen* (2009) 46 Cal.4th 1007, rejected this contention, but contends *Nguyen* was wrongly decided. He raises the issue here to preserve it for federal review.

Apprendi held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.) *Nguyen*, however, rejected the contention that the absence of a right to a jury trial at a juvenile adjudication precludes all future use of a sustained petition as a strike. *Nguyen* reasoned that *Apprendi* requires “at most, the right to a jury trial in the current criminal proceeding with respect to any sentencing fact that may increase the maximum punishment for the underlying conviction.” (*People v. Nguyen, supra*, 46 Cal.4th at p. 1012.) “So long as an accused adult is accorded his or her right to a jury trial *in the adult proceeding* as to all facts that influence the maximum permissible sentence, no reason appears why a constitutionally reliable prior adjudication of criminality, obtained pursuant to *all procedural guarantees constitutionally due to the offender in the prior proceeding*—specifically including the right to proof beyond a reasonable doubt—should not also be among the facts available for that sentencing purpose.” (*Id.* at p. 1023.)

We are bound to follow *Nguyen*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Here, Contreras had the right to a jury trial to determine whether he suffered the prior juvenile adjudication. Therefore, there was no *Apprendi* violation. (*People v. Nguyen, supra*, 46 Cal.4th at p. 1023.)

2. *Contreras is entitled to additional custody credits.*

At sentencing, the trial court awarded Contreras 112 days of actual custody credit and 56 days of presentence conduct credit, for a total of 168 days. Contreras contends the trial court miscalculated the total number of days he spent in presentence custody, and applied the wrong credit calculation formula when calculating presentence conduct credits. The People concede the point, and we agree.

A defendant is entitled to actual custody credit for “all days of custody” spent in county jail. (§ 2900.5, subd. (a); *People v. Denman* (2013) 218 Cal.App.4th 800, 814; *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) Calculation of custody credits begins on the day of arrest and continues through the day of sentencing. (*People v. Denman, supra*, at p. 814; *People v. Rajanayagam, supra*, at p. 48; *People v. Bravo* (1990) 219 Cal.App.3d 729, 735.) Contreras was arrested on April 19, 2013 and sentenced on August 5, 2013. Thus, his credit for actual days spent in custody should have been 109 days, not 112.

A defendant is also entitled to presentence conduct credit pursuant to section 4019. (*People v. Dieck* (2009) 46 Cal.4th 934, 939; *People v. Rajanayagam, supra*, 211 Cal.App.4th at p. 48.) Section 4019 specifies the rate at which prisoners in local custody may earn conduct credit against their sentences for good behavior. (*People v. Brown* (2012) 54 Cal.4th 314, 317; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1549.) The Legislature amended section 4019 several times between 2010 and 2011 to implement varying rates. (See *People v. Brown, supra*, at pp. 317-318; *People v. Lara* (2012) 54 Cal.4th 896, 899; *People v. Rajanayagam, supra*, at pp. 48-50.) The version of the statute in effect in 2013, when Contreras committed his crime and was sentenced, provided for a maximum of two days of conduct credit for every two days spent in actual confinement. (*People v. Ellis, supra*, at pp. 1549-1550; *People v. Rajanayagam, supra*, at p. 49.) Unlike some prior versions of the law, the 2013 version did not exclude prisoners who have suffered prior convictions for serious or violent felonies from this formula. (See *People v. Lara, supra*, at p. 906, fn. 9.)

Accordingly, Contreras's presentence conduct credits should have been calculated at the rate of two days for every two days spent in local custody. (*People v. Rajanayagam*, *supra*, 211 Cal.App.4th at p. 49.) Defendant's days of actual custody (109 days) are divided by 2 (54.5 days), the remainder is discarded, and the result (54 days) is doubled to give the total conduct credits earned, 108 days. (See *In re Marquez* (2003) 30 Cal.4th 14, 25-26.) The failure to properly calculate custody and conduct credit is a jurisdictional error that can be corrected at any time. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 591.) Accordingly, we order the judgment modified and the abstract of judgment amended to award defendant 109 days of actual custody credit and 108 days of presentence custody credit, for a total of 217 days.

DISPOSITION

The judgment is modified to reflect 109 days of actual custody credit and 108 days of presentence conduct credit for a total presentence custody credit of 217 days. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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ALDRICH, J.

We concur:

EDMON, P. J.

KITCHING, J.